

The Honorable James P. Donohue

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Y-TEX CORPORATION,)	
)	
Plaintiff,)	No. Civil Action No. C10-1264 JPD
)	
v.)	
)	IN ADMIRALTY
SCHENKER INC.,)	
)	ANSWER TO COMPLAINT WITH
Defendant.)	AFFIRMATIVE DEFENSES

Defendant Schenker Inc. ("Schenker"), answering Plaintiff Y-Tex Corporation's ("Y-Tex") Complaint, alleges upon information and belief as follows:

JURISDICTION AND VENUE

1. The allegations of paragraph "1" of the Complaint set forth legal conclusions not requiring a response; to the extent construed otherwise the answering Defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations.

2. The allegations of paragraph "2" of the Complaint set forth legal conclusions not requiring a response; to the extent construed otherwise, the allegations are denied, except the answering Defendant admits only that Defendant does business and has a registered agent for service of process within this District.

ANSWER TO COMPLAINT WITH AFFIRMATIVE
DEFENSES - 1
Case No. Civil Action No. C10-1264 JPD

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PARTIES

3. Denies knowledge or information sufficient to form a belief that Plaintiff is a company incorporated and duly organized and existing under the laws of the State of Wyoming with its principal place of business in Cody, Wyoming, and denies the remaining allegations of paragraph “3” of the Complaint.

4. Admits only that Defendant is a company incorporated and duly organized and existing under the laws of the State of New York and is authorized to do business in the State of Washington, having a registered agent for service of process within the State of Washington, but denies all the remaining allegations of paragraph “4” of the Complaint.

FACTS

5. Denies each and every allegation in paragraph “5” of the Complaint.

6. Denies each and every allegation in paragraph “6” of the Complaint.

7. Denies each and every allegation in paragraph “7” of the Complaint.

8. Denies each and every allegation in paragraph “8” of the Complaint.

9. Denies each and every allegation in paragraph “9” of the Complaint.

10. Denies each and every allegation in paragraph “10” of the Complaint.

11. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph “11” of the Complaint.

12. Denies each and every allegation in paragraph “12” of the Complaint.

13. Denies each and every allegation in paragraph “13” of the Complaint.

14. Denies each and every allegation in paragraph “14” of the Complaint.

15. Denies each and every allegation in paragraph “15” of the Complaint.

1 16. Denies each and every allegation in paragraph “16” of the Complaint.

2 17. Denies each and every allegation contained in paragraph “17” of the Complaint
3 and refers all questions of law to the Court and all questions of fact to the trier thereof.

4 18. Denies each and every allegation contained in paragraph “18” of the Complaint
5 and refers all questions of law to the Court and all questions of fact to the trier thereof.

6 19. Denies each and every allegation contained in paragraph “19” of the Complaint
7 and refers all questions of law to the Court and all questions of fact to the trier thereof.

8 20. Denies each and every allegation contained in paragraph “20” of the Complaint
9 and refers all questions of law to the Court and all questions of fact to the trier thereof.

10 21. Denies knowledge or information sufficient to form a belief as to the truth of each
11 and every allegation contained in paragraph “21” of the Complaint.

12 22. Denies each and every allegation contained in paragraph “22” of the Complaint
13 and refers all questions of law to the Court and all questions of fact to the trier thereof.

14 23. Denies each and every allegation contained in paragraph “23” of the Complaint
15 and refers all questions of law to the Court and all questions of fact to the trier thereof.

16 24. Denies each and every allegation contained in paragraph “24” of the Complaint
17 and refers all questions of law to the Court and all questions of fact to the trier thereof.

18 25. Denies each and every allegation contained in paragraph “25” of the Complaint
19 and refers all questions of law to the Court and all questions of fact to the trier thereof.

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21
22
23 **FIRST CAUSE OF ACTION – FALSE BILLS OF LADING**

24 26. The answering Defendant repeats and realleges its responses contained in
25 paragraphs “1” through “25” of this Answer to the Complaint as if fully set forth herein.

1 27. Denies each and every allegation contained in paragraph “27” of the Complaint
2 and refers all questions of law to the Court and all questions of fact to the trier thereof.

3 28. Denies each and every allegation contained in paragraph “28” of the Complaint
4 and refers all questions of law to the Court and all questions of fact to the trier thereof.

5 29. Denies each and every allegation contained in paragraph “29” of the Complaint
6 and refers all questions of law to the Court and all questions of fact to the trier thereof.

7
8 **SECOND CAUSE OF ACTION – GEOGRAPHIC DEVIATION**

9 30. The answering Defendant repeats and realleges its responses contained in
10 paragraphs “1” through “29” of this Answer to the Complaint as if fully set forth herein.

11 31. Denies each and every allegation contained in paragraph “31” of the Complaint
12 and refers all questions of law to the Court and all questions of fact to the trier thereof.

13
14 **THIRD CAUSE OF ACTION – BREACH OF FIDUCIARY DUTY**

15 32. The answering Defendant repeats and realleges its responses contained in
16 paragraphs “1” through “31” of this Answer to the Complaint as if fully set forth herein.

17 33. Denies each and every allegation contained in paragraph “33” of the Complaint
18 and refers all questions of law to the Court and all questions of fact to the trier thereof.

19 34. Denies each and every allegation contained in paragraph “34” of the Complaint
20 and refers all questions of law to the Court and all questions of fact to the trier thereof.

21
22 **FOURTH CAUSE OF ACTION – BREACH OF CONTRACT OF CARRIAGE**

23 35. The answering Defendant repeats and realleges its responses contained in
24 paragraphs “1” through “34” of this Answer to the Complaint as if fully set forth herein.

1 36. Denies each and every allegation contained in paragraph “36” of the Complaint
2 and refers all questions of law to the Court and all questions of fact to the trier thereof.

3 37. Denies each and every allegation contained in paragraph “37” of the Complaint
4 and refers all questions of law to the Court and all questions of fact to the trier thereof.

5 38. Denies information and knowledge sufficient to form a belief that Plaintiff’s
6 Argentina customer had incurred \$43,081.20 in storage costs and costs associated with efforts to
7 secure the release of the goods, and denies all remaining allegations of paragraph “38” of the
8 Complaint.

9 39. Denies each and every allegation contained in paragraph “39” of the Complaint
10 and refers all questions of law to the Court and all questions of fact to the trier thereof.

11 40. Denies each and every allegation contained in paragraph “40” of the Complaint
12 and refers all questions of law to the Court and all questions of fact to the trier thereof.

13 41. Denies each and every allegation contained in paragraph “41” of the Complaint
14 and refers all questions of law to the Court and all questions of fact to the trier thereof.

15 **AS AND FOR ITS FIRST AFFIRMATIVE DEFENSE**

16 42. The Complaint fails to state a claim against Defendant on which relief can be
17 granted.

18 **AS AND FOR ITS SECOND AFFIRMATIVE DEFENSE**

19 43. Defendant is not liable to Plaintiff on the causes of action alleged in the
20 Complaint.

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AS AND FOR ITS THIRD AFFIRMATIVE DEFENSE

44. If there was loss and/or damage to cargo as alleged in the Complaint it was occasioned by causes for which the Defendant is exonerated under the United States Carriage of Goods by Sea Act, note following 46 U.S.C. § 30701 (“COGSA”).

AS AND FOR ITS FOURTH AFFIRMATIVE DEFENSE

45. If this Honorable Court finds that the Plaintiff has suffered damages to cargo for which Defendant is liable, said damages must be limited pursuant to COGSA, note following 46 U.S.C. § 30701.

AS AND FOR ITS FIFTH AFFIRMATIVE DEFENSE

46. If there was any loss of and/or damage to cargo as alleged in the Complaint, Defendant is not liable to the Plaintiff by reasons of the provisions contained in the bill(s) of lading, contract of carriage, charter party, applicable tariffs, special contract, or dock receipt.

AS AND FOR ITS SIXTH AFFIRMATIVE DEFENSE

47. If there was any loss and/or damage to cargo as alleged in the Complaint, it was occasioned by causes for which the Defendant is exonerated under the Harter Act, 46 App. U.S.C. § 190, *et seq.*

AS AND FOR ITS SEVENTH AFFIRMATIVE DEFENSE

48. Defendant puts Plaintiff to its proof of compliance with the provisions for giving of notice and the commencement of suit as provided in aforesaid bill(s) of lading and in COGSA, note following 46 U.S.C. § 30701.

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AS AND FOR ITS EIGHTH AFFIRMATIVE DEFENSE

49. The Complaint is barred in whole or in part by the relevant statute of limitations and/or laches.

AS AND FOR ITS NINTH AFFIRMATIVE DEFENSE

50. The Complaint is barred in whole or in part by the doctrine of estoppel.

AS AND FOR ITS TENTH AFFIRMATIVE DEFENSE

51. The Complaint is barred in whole or in part by the doctrine of unclean hands.

AS AND FOR ITS ELEVENTH AFFIRMATIVE DEFENSE

52. Any damages sustained by Plaintiff, as alleged in the Complaint, were proximately, directly, and solely caused by the negligent acts of third persons over whom Defendant had and has no direction or control.

AS AND FOR ITS TWELFTH AFFIRMATIVE DEFENSE

53. Plaintiff knowingly and intentionally assumed any and all risks inherent in the shipment(s) of goods at issues by sea, which is a complete bar to recovery.

AS AND FOR ITS THIRTEENTH AFFIRMATIVE DEFENSE

54. Any injuries that may have been sustained by Plaintiff, as alleged in the Complaint, occurred as a direct result of Plaintiff's own negligent conduct, and not by any negligence of Defendant, and as such Plaintiff is barred from recovery in this action.

AS AND FOR ITS FOURTEENTH AFFIRMATIVE DEFENSE

55. Plaintiff is guilty of culpable conduct in the events giving rise to the claims now asserted in Plaintiff's Complaint, and its recovery, if any, must be diminished in proportion thereto.

AS AND FOR ITS FIFTEENTH AFFIRMATIVE DEFENSE

56. Plaintiff has failed to mitigate its damages.

AS AND FOR ITS SIXTEENTH AFFIRMATIVE DEFENSE

57. The Complaint should be dismissed pursuant to the doctrine of *forum non conveniens*.

AS AND FOR ITS SEVENTEENTH AFFIRMATIVE DEFENSE

58. The action, or part thereof, is founded upon improper venue and/or should be transferred pursuant to 28 U.S.C. § 1404.

AS AND FOR ITS EIGHTEENTH AFFIRMATIVE DEFENSE

59. The terms of the bills of lading, tariff and/or other governing contracts between the parties require that this matter be heard in a forum other than this Court.

AS AND FOR ITS NINETEENTH AFFIRMATIVE DEFENSE

60. The parties' dispute herein is exclusively subject to Hong Kong law and the Courts of Hong Kong pursuant to the following "Jurisdiction and Law Clause" incorporated into the parties' agreement:

The contract evidenced by or contained in this Bill of Lading shall be governed by and construed in accordance with Hong Kong law and, save as may be compulsorily applicable under the local law of the place of loading or that of discharge, any dispute arising hereunder shall be determined in the Courts of Hong Kong to which jurisdiction both the Merchant and the Carrier irrevocably agree to submit.

AS AND FOR ITS TWENTIETH AFFIRMATIVE DEFENSE

61. This Answer is made without waiver of any additional and further jurisdictional defenses or rights to arbitrate that may exist between the parties.

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AS AND FOR ITS TWENTY-FIRST AFFIRMATIVE DEFENSE

62. Defendant reserves the right to amend this Answer if and once additional information is obtained through discovery.

WHEREFORE, Defendant prays for judgment dismissing the Complaint herein, awarding Defendant costs, fees, including reasonable attorneys' fees and disbursements of this action, and such other further relief the Court may deem just and proper.

Dated: Seattle, Washington
September 30, 2010

Respectfully submitted,

FOSTER PEPPER PLLC
Attorneys for Defendant Schenker Inc.

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2010, I electronically filed this attached document with the clerk of the court using the CM/ECF system which will send notification of such filing to the following:

VIA ELECTRONIC SERVICE FROM THE COURT:

Christopher W. Nicoll
Nicoll Black & Feig, PLLC
1325 Fourth Ave., Suite 1650
Seattle, WA 98101

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington on September 30, 2010.

/s/ Steven W. Block
Steven W. Block

ANSWER TO COMPLAINT WITH AFFIRMATIVE
DEFENSES - 10
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